No. 08-15759

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEDICAL DEVELOPMENT INTERNATIONAL, a Delaware corporation,
Plaintiff-Appellant,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ROBERT SILLEN, individually, and J. CLARK KELSO, as Receiver,
Defendants-Appellees.

Consolidated appeals from:

U.S. District Court for the Eastern District of California
Action No. CV 07-02199 WBS-EFB
The Honorable William B. Shubb

and

U.S. District Court for the Northern District of California
Action No. CV 01-01351 TEH
The Honorable Thelton E. Henderson

BRIEF OF APPELLEE J. CLARK KELSO

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STATEMENT OF JURISDICTION

Appellee J. Clark Kelso ("Kelso"), as Receiver ("Receiver"), submits that the U.S. District Court for the Eastern District of California ("Eastern District") properly exercised removal jurisdiction pursuant to 28 U.S.C. §§ 1442(a)(3) and (a)(1). *See Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co.*, 644 F.2d 1310, 1313-1316 (9th Cir. 1981).

The U.S. District Court for the Northern District of California ("Northern District") lacked jurisdiction, and therefore properly declined, to render an advisory opinion as to whether appellee California Department of Corrections and Rehabilitation ("CDCR") may assert the Receiver's immunity from suit as a defense to claims brought by appellant Medical Development International ("MDI") in state court. This Court likewise lacks jurisdiction to render such an opinion. *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007).

The Receiver concurs in the remainder of the jurisdictional statement submitted by MDI.

STATEMENT OF ISSUES

1. Did the Eastern District properly dismiss MDI's complaint for lack of subject matter jurisdiction where MDI:

a. sought compensatory and punitive damages from the Receiver in his official capacity for actions taken in furtherance of the duties conferred upon him by the Northern District; and,

b. failed to obtain the Northern District's permission to sue the Receiver?

2. Did the Northern District thereafter properly deny MDI permission to sue the Receiver in his official capacity on the ground that the Receiver enjoys immunity from suit for actions taken in furtherance of the duties conferred on him by that court?

3. If this Court reverses the Northern District, must the case be remanded to that court to permit it to decide whether to retain jurisdiction over MDI's proposed suit against the Receiver?

4. Should this Court render an advisory opinion as to whether CDCR may assert the Receiver's immunity from suit as a defense to MDI's claims?

STANDARD OF REVIEW

The Receiver concurs with MDI that whether the Eastern District had subject matter jurisdiction is reviewed *de novo* by this Court. *Marshall Leasing v. United States*, 893 F.2d 1096, 1098 (9th Cir. 1990).

Whether the Northern District properly denied MDI permission to sue the Receiver is reviewed for abuse of discretion. *SEC v. Lincoln Thrift Ass'n*, 557

F.2d 1274, 1278 (9th Cir. 1977). The trial court's exercise of discretion will not be disturbed unless there is "'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Moneymaker v. CoBen (In re Eisen)*, 31 F.3d 1447, 1451 (9th Cir. 1994) (citations omitted).

INTRODUCTION

MDI comes before the Court casting itself in the role of victim. (Appellant's Opening Brief ("AOB"), p. 5.) Careful examination of the record reveals that MDI is a victim only of its own miscalculations.

In 2006, MDI embarked on a risky strategy to obtain a lucrative contract in the prison system. Although the Receiver possesses exclusive authority over contracting in the prison medical care system (2 Appellant's Excerpts of Record ("ER") 102, 104), MDI gambled that it could negotiate with CDCR officials without the Receiver's knowledge or consent. MDI gambled again when it commenced work at two prisons –without the Receiver's knowledge or consent – even though it a) had not been selected after competitive bidding and b) did not have a contract approved by the state's Department of General Services ("DGS"). (*See* Supplemental Excerpts of Record ("SER") 97-98). Competitive bidding and approval by DGS are generally required before a contract with the state will be valid and enforceable. Cal. Pub. Contracts Code §§ 10295, 10297,

10340, 10342, 10344. MDI claims that it could avoid these requirements because it "relied" on an order, dated March 30, 2006, issued by the Northern District. That order temporarily waived the need for executed contracts, to permit doctors and hospitals to be paid for services previously rendered to CDCR, and the need for competitive bidding as to new contracts with clinicians. (2 ER 160 *et seq*.) For MDI to "rely" on the March 30, 2006 order – which plainly applied only to licensed clinicians and hospitals – MDI needed a medical license. It had no such license. Thus, MDI gambled that it could evade still another provision of state law: California's strict prohibition on the "corporate practice of medicine." *See* Cal. Bus. & Prof. Code § 2400.

Perhaps MDI took these chances because it hoped that "facts on the ground," *i.e*., that it was already operating at two institutions, would convince the Receiver to ignore the manner in which it got into the prisons and the questionable lawfulness of its services and to offer it a larger or longer term contract. But far from ignoring these problems, when the Receiver learned about MDI and its "contract," he halted further payments to MDI until he could investigate. (SER 98.) The Receiver's investigation raised questions not only about the legality of MDI's "contract" and its services, it raised doubts about the fees that MDI was charging, fees that neither the Receiver nor anyone working for him had approved. (SER 98.)

When the Receiver pressed MDI to provide appropriate assurances that its services did not violate the law and to provide information about its cost structure, MDI refused and began eliminating services. (SER 101.) The Receiver then ended MDI's relationship with the prisons.

The issue for this Court, therefore, is whether MDI – which created the very predicament in which it found itself and whose "contract" was never authorized by the Receiver – should nevertheless be permitted to sue him. In pursuing this litigation, MDI has been no more straightforward than it was in its business dealings. MDI did not inform this Court, for example, that it first attempted to rush the Northern District into making a hurried decision about the lawfulness of its services. (SER 15 *et seq*., 96.) When that did not work, MDI waited months before suing the Receiver in *state* court, exclusively in tort. After that action was removed, MDI argued that it did not need the Northern District's permission to sue because the Receiver was "operating" the prison medical care system and that appellee Robert Sillen ("Sillen"), as Receiver, was not immune personally from suit. (SER 134-139, 141-142.) When those arguments failed, and after Kelso replaced Sillen, MDI tried a new tack. It added new claims sounding in contract, now contends that it does not need permission to sue because the Receiver has been sued only in his "official capacity," and concedes that Sillen has no personal liability. Meanwhile, MDI

has sued CDCR in state court and asks this Court to opine on the merits of CDCR's defenses in that case.

MDI's ever-shifting litigation tactics were and are unavailing. The courts below each properly concluded that MDI's claims against the Receiver could not overcome the legal barriers erected to protect receivers from the kind of harassing and distracting litigation that this case exemplifies. If MDI is without a "remedy" – a dubious proposition that is not before this Court – it is not the fault of the District Courts. This Court should affirm.

STATEMENT OF THE CASE

By order, dated February 14, 2006, in *Plata v. Schwarzenegger*, C01-1351 (N.D. Cal) (the "*Plata* Action"), the Hon. Thelton E. Henderson appointed Sillen to be the Receiver for the California prison medical health care system. (2 ER 101 *et seq*.)[1]

On April 3, 2007, MDI brought an *ex parte* application in the Northern District seeking to challenge the Receiver's decision to terminate MDI's services to two California prisons. Finding no urgency, the Northern District denied the application and instructed MDI to seek intervention pursuant to FRCP 24 if it wished to bring the matter before the court. (SER 96 *et seq*.)

[1] Unless the context requires distinguishing between Sillen and Kelso, they will both be referred to as the "Receiver."

Rather than request intervention in the *Plata* Action, MDI filed a complaint, more than five months later, in Sacramento County Superior Court against CDCR and the Receiver individually and in his capacity as receiver. (2 ER 121.) MDI's claims against the Receiver sounded exclusively in tort. The Receiver removed the action to the Eastern District, pursuant to 28 U.S.C. §§ 1442(a)(3) and (a)(1), and brought a motion to dismiss on the ground, *inter alia*, that the District Court lacked subject matter jurisdiction because MDI had not obtained permission from the Northern District to sue the Receiver in a court other than the Northern District. (2 ER 96-97, 117-118.) CDCR also moved to dismiss the action.

On February 1, 2008, following his appointment as Receiver, Kelso substituted as a party-defendant for Sillen in his official capacity as Receiver. (2 ER 92.) Sillen remained a defendant in his individual capacity. The Eastern District thereafter granted the motion to dismiss and entered judgment in favor of all defendants. (1 ER 12-24.)

MDI filed a notice of appeal on March 14, 2008. (2 ER 87.) The parties stipulated to a stay of the appeal while MDI brought a motion in the Northern District to request permission to sue the Receiver. (2 ER 52.)

On May 15, 2008, MDI filed its motion in the Northern District seeking leave to sue Kelso, in his official capacity as Receiver, in state court and

attached a proposed complaint that sought damages based on contract and tort theories of recovery. (2 ER 36-49.) The Receiver opposed the motion based on his immunity from suit for the claims alleged and on the further grounds that the proposed complaint otherwise failed to allege claims upon which relief could be granted. (SER 106-126.) Finding that the Receiver enjoyed immunity from suit, Judge Henderson exercised his discretion to decline MDI permission to sue the Receiver in any court. (1 ER 1-11.) MDI filed a notice of appeal on August 14, 2008. (2 ER 29.)

STATEMENT OF FACTS

A. The Failure Of The *Plata* Remedial Plan Prior To Appointment Of The Receiver.

Following commencement of the *Plata* litigation in 2001, the parties stipulated to an injunction and other orders that were intended to bring the prison medical care system up to constitutional standards. *See Plata v. Schwarzenegger*, 2005 U.S. Dist. LEXIS 43796, *4-*6 (N.D. Cal., Oct. 3, 2005) (describing remedial orders). The *Plata* court concluded however that, despite the stipulated orders, the prison medical system was "broken beyond repair" and was literally killing people. *Id.* at *2-*3. The system was also enormously wasteful, unduly bureaucratic and riddled with incompetence. *Id.* at *8-*60. Finding that the prior remedial efforts had failed, the *Plata* court

concluded that only a drastic, systemic overhaul could address the crisis in prison medical care. *Id*. at *50-*60, *66 *et seq*.

B. The Appointment Of The Receiver.

On February 14, 2006, Judge Henderson issued the Order ("OAR") appointing Sillen as Receiver. The OAR gave the Receiver the responsibility "to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component of the CDCR." (2 ER 102.) The Receiver holds "all powers vested by law in the Secretary of the CDCR as they relate to the administration, control, management, operation, and financing of the California prison medical health care system. The Secretary's exercise of the above powers is suspended for the duration of the Receivership . . " and the Receiver is specifically "empowered to negotiate new contracts and to renegotiate existing contracts . . . ." (2 ER 104.) Significantly, in the exercise of his duties, "[t]he Receiver and his staff shall have the status of officers and agents of this Court, *and as such shall be vested with the same immunities as vest with this Court*." (2 ER 106 (emphasis added).)

C. The March 30, 2006 Order Regarding CDCR Contracts With Medical Professionals And Hospitals.

On March 30, 2006, before the Receiver commenced work,[2] Judge Henderson issued an order pertaining, *inter alia*, to "State contract negotiations relating to health care services for CDCR inmates, and contractual payments to service providers (clinicians and medical facilities) who provide health care services to CDCR inmates." (2 ER 160.) That order required CDCR to pay "all *current* outstanding, valid and CDCR-approved *medical* invoices (even in the absence of a separate written approved contract) within 60 days of the date of this order." (2 ER 164 (emphasis added).) It provided further that, on a temporary basis, "CDCR shall not be required to competitively bid *medical services* contracts nor file bid exemption applications with DGS" for new contracts with clinicians. (2 ER 166 (emphasis added).)

D. Without The Receiver's Knowledge Or Consent, MDI Negotiates With CDCR And Begins Performance Without A Contract.

Sometime in or around March 2006, MDI entered into negotiations with CDCR officials for the provision of certain services at two California prisons: California State Penitentiary, Los Angeles ("LAC") and California Correctional Institution in Tehachipi ("CCI"). (2 ER 127.) MDI boasted that it had doctors,

[2] The OAR became effective April 17, 2006. (2 ER 102.)

hospitals and medical groups in its network, and could make those providers available to the prisons. (SER 38, 46-56.) MDI offered to provide physician, inpatient and outpatient facility services which conformed to community standards as well as referrals to specialists. (SER 85-86, 88.) Finally, MDI proposed to negotiate a rate structure with the physicians providing services to CDCR and to pay those physicians for such services. (SER 89-90.)

In or around September 2006, although MDI had not been selected through competitive bidding and had no executed final agreement, it began providing services to LAC and CCI. (SER 97.) Despite the Receiver's authority over contracting in the prison medical care system, the Receiver was unaware of CDCR's negotiations with MDI and that it had begun providing services to LAC and CCI. (2 ER 129; SER 97.)

E. The Receiver Questions The Legality Of MDI's Services And Subsequently Decides To Terminate Those Services.

In about November 2006, CDCR staff alerted the Receiver to MDI and to that fact that it had begun performing services without following the State's competitive bidding process. (2 ER 129; SER 97.) CDCR staff also raised a concern that MDI – which is not licensed to practice medicine in California – might be providing medical services in violation of California's prohibition on

the corporate practice of medicine. *See* Cal. Bus. & Prof. Code § 2400. (2 ER 130; SER 98.)

MDI alleges that Dr. Peter Farber-Szekrenyi of the CDCR instructed CDCR staff to "either draft a restructured agreement for services that alleviated the CDCR's alleged concerns regarding compliance with medical licensing provisions or to report that no such agreement [was] possible." (2 ER 130.) MDI knew that CDCR might "conclude that MDI need[ed] a medical license." (SER 40, 98.)

Meanwhile, the Receiver had stepped in and put a halt to the contracting process because of concerns about the legality of MDI's services, as well as other irregularities in MDI's mode of operation, including its failure to comply with California's public contracting law and that its rates appeared excessive. (2 ER 63; SER 97-98.) The Receiver ordered a cessation of payments to MDI pending a resolution of those issues. (2 ER 63; SER 98.) MDI did not object; instead, it willingly continued providing services, purportedly on the strength of the March 30, 2006 order. (2 ER 64.) The last payment that MDI received was in January 2007. (2 ER 63.).

On or about February 16, 2007, the Receiver met with MDI, expressed his concern about the legality of MDI's services and indicated that MDI could be paid if MDI's services were determined to be lawful. (2 ER 64.) MDI

alleges that about this time, the Receiver "informed Dr. Farber-Szekrenyi that MDI would never be paid." (*Id.*) MDI also alleges that, during the February 16 meeting, the Receiver told MDI that if it ceased performing services, he would "'make sure MDI never worked in California again.'" (2 ER 65.) MDI alleged that "it felt it had no choice but to continue to provide services. . . ." (*Id.*) In fact, MDI admitted in the Northern District that it did not "want to stop work" and agreed to continue providing services without pay unless and until it had satisfied the Receiver that its services were lawful. (SER 42, 99; *see also* 2 ER 64.)

Eventually, MDI gave the Receiver a letter, written by counsel MDI had retained, which argued that MDI's services were lawful. (SER 41, 57 *et seq.*, 100; 2 ER 65.) MDI did not provide any opinion from the California Medical Board or California Department of Consumer Affairs, the State administrative agencies charged with the responsibility for enforcing the prohibition on the corporate practice of medicine. MDI declined to provide such an opinion even after the Receiver requested one. (SER 100; 2 ER 65.) MDI also refused to provide the Receiver with information explaining its contractual relationships with physicians and hospitals, including the rates that MDI paid those providers. (SER 99-100; 2 ER 65-66.)

Soon thereafter, MDI began eliminating "high dollar" services no matter how essential to patient care. (SER 101.) The Receiver terminated MDI's services at LAC and CCI, effective April 6, 2007. (2 ER 66; SER 101.)

F. MDI's Declines To Proceed In The Northern District And Files A Complaint In State Court; The Receiver Removes The Action To The Eastern District.

On April 3, 2007, MDI brought an *ex parte* application before Judge Henderson for "instructions" that its services CDCR did not constitute the unlawful corporate practice of medicine and, therefore, that it did not need a license to continue providing those services. (SER 15.) Judge Henderson denied the application, finding that MDI could seek leave to intervene pursuant to the "rules that normally govern such motions. In the event that the motion is granted and MDI obtains the status of a party in this matter, MDI may then notice its Motion for Instructions." (SER 103.) Rather than proceed before Judge Henderson, however, MDI filed an action in state court five months later. (2 ER 121.) The Receiver removed the action to the Eastern District. (2 ER 117.)

G. The Eastern District Dismisses MDI's Action And MDI Belatedly Seeks Permission From The Northern District To Sue The Receiver In State Court.

MDI's complaint in the Eastern District asserted claims against the Receiver "as an individual and as a receiver" for intentional and negligent

misrepresentation; negligent and intentional interference with economic advantage; economic duress; abuse of process; and, equitable estoppel and requested millions of dollars in compensatory and punitive damages. (2 ER 121 *et seq*.) The Eastern District granted the Receiver's motion to dismiss the complaint based on MDI's failure to obtain the Northern District's permission to sue. (1 ER 13 *et seq*.) While the appeal from that case was stayed by stipulation of the parties, MDI requested leave from the Northern District to sue the Receiver in state court. (2 ER 36.)

Since Sillen was no longer the Receiver, MDI's proposed complaint named as defendants CDCR and Kelso only, "in his capacity as a receiver." (2 ER 53.) Although the factual allegations of the new complaint tracked closely the allegations in the complaint before the Eastern District, MDI asserted contract and quasi-contract claims against the Receiver, in addition to the tort claims previously alleged. (Compare 2 ER 53 *et seq*. with 2 ER 121 *et seq*.) The Northern District denied MDI's motion, finding that Kelso was immune from suit, and declined MDI permission to sue the Receiver in any court, state or federal. (1 ER 1-11.)[3]

[3] The Receiver also argued that MDI's claims failed to state claims upon which relief could be granted on a variety of state law grounds. (SER 113 *et seq*.) In light of its ruling on the immunity issue, the District Court did not reach the Receiver's other arguments. (1 ER 5-11.)

SUMMARY OF ARGUMENT

The Eastern District properly exercised removal jurisdiction. Federal receivers acting under color of their office have an absolute right, pursuant to 28 U.S.C. § 1442, to remove to federal court a state court action brought against them. *Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co.*, 644 F.2d 1310 (9th Cir. 1981).

Permission of the court that appointed a receiver must be obtained before suit may be brought against the receiver in another court for acts or omissions in the course of the receiver's official duties. This rule is jurisdictional and it is immaterial whether the receiver is sued personally or in his official capacity. *See Barton v. Barbour*, 104 U.S. 126 (1881); *Beck v. Fort James Corp. (In re Crown Vantage, Inc.)*, 421 F.3d 963 (9th Cir. 2005). It is undisputed that MDI did not first obtain Judge Henderson's permission before filing suit in state court (which suit was removed to federal court).

The very narrow, and rarely applied, exception to the *Barton* rule, codified at 28 U.S.C. § 959(a), does not apply where, as here, the Receiver is alleged to have engaged in wrongdoing in furtherance of duties conferred upon him by the appointing court. That statute applies only to routine claims arising out of the actual operation of the business in receivership. Application of the statute is dependent on the conduct at issue, not on the capacity in which the

receiver is sued. Because MDI did not obtain the Northern District's permission to sue, the Eastern District lacked subject matter jurisdiction and properly dismissed the complaint.

MDI then requested Judge Henderson's permission to sue the Receiver in state court. Whether to permit such a suit is committed to the sound discretion of the court. The district court must first determine if the claim states a prima facie case against the receiver. If not, permission to sue will be denied. If so, the district court must engage in a multi-factorial analysis to determine whether the suit should proceed in the appointing court or in another court. *See In re Kashani*, 190 B. R. 875, 886-887 (9th Cir. BAP 1995); *accord: Crown Vantage*, 421 F.3d at 976.

The OAR specifically confers immunity on the Receiver to the same extent as the court itself enjoys. Judges are entitled to absolute immunity in their personal and official capacity for judicial acts within their jurisdiction. Settled law also holds that receivers are entitled to absolute quasi-judicial immunity from suit for discretionary decisions made on behalf of the appointing court.

The Receiver had complete authority over contracting within the prison medical care system pursuant to the OAR. Accordingly, the Receiver's decision to terminate MDI's services – services he had not authorized and

which appeared to violate state law in multiple respects – was in furtherance of his core duties to bring the prison medical care system up to constitutional standards and was within his discretion while acting on behalf of the court. Judge Henderson properly concluded that the Receiver was absolutely immune from suit and thus denied MDI permission to sue in any court.

That MDI's proposed suit against the Receiver named him only in his official capacity is of no moment; absolute immunity is an immunity from suit, not simply an immunity from damages. The immunity applies to all claims brought against the officer entitled to immunity, whether in his personal or official capacity. This Court has applied quasi-judicial immunity to subordinate judicial officers in their official capacity and application of such immunity is particularly compelling where, as here, a public agency is in receivership.

Because the Northern District concluded that the Receiver enjoyed immunity, the lower court neither considered the Receiver's other arguments why MDI had not stated a prima facie case nor undertook the second step of the *Crown Vantage*/*Kashani* analysis. Thus, if this Court reverses the Northern District, it must remand the case to that court to permit it to determine if MDI otherwise states a prima facie case and, if so, to engage in the balancing required under *Crown Vantage* and *Kashani*.

Finally, this Court cannot and should not render an advisory opinion as to whether CDCR may assert the Receiver's immunity as a basis to defeat MDI's claims against it.

ARGUMENT

I. THE JUDGMENT OF DISMISSAL BY THE EASTERN DISTRICT SHOULD BE AFFIRMED.

A. The Eastern District Properly Exercised Removal Jurisdiction.

Although MDI did not challenge the Eastern District's removal jurisdiction below, it does so here. Removal jurisdiction was appropriate.

The Receiver removed the action to federal court pursuant to 28 U.S.C. § 1442(a)(1) and (3). Subdivision (3), in particular, permits removal by:

> (3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties.

In Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co., 644 F.2d 1310 (9th Cir. 1981), this Court held that a federal receiver properly removed a state court action pursuant to Section 1442(a)(3).

> Where, as here, a plaintiff is challenging a receiver's personal dereliction of court imposed duties and complaining of a receiver's conduct before the appointing federal court, the issues and defenses to be tried would involve an examination of the duties and obligations of the receiver as ordered by the appointing federal court. As such, the acts of the receiver in issue are directly under color of office or in the performance of court imposed duties. Since an examination of the receiver's acts directly involves an examination of the appointing federal court's orders, there is a strong federal interest in providing federal court access.

Id. at 1313.[4]

The *Ely Valley Mines* Court distinguished the Supreme Court's decision denying removal in *Gay v. Ruff*, 292 U.S. 25 (1934), on the grounds that *Gay* involved only the receiver's vicarious liability under state law arising out of negligent operation of the business in receivership. *Id.* Under those circumstances, "the receiver's liability is not directly based upon his acts done under color of office or in the performance of his court ordered duties. Accordingly, the nexus between the federal court orders and the charge of wrongdoing is so attenuated that federal court access is not necessary to protect any federal interest." *Id.*

The challenged conduct here – the Receiver's termination of MDI's services – arose out of, and was based upon, his court-ordered authority over contractual, legal and administrative functions in the prison medical care system. MDI seeks to hold the Receiver liable for his own actions, rather than vicariously for acts of the Receiver's agents. Had the case proceeded beyond the motion stage, it necessarily would have involved consideration of the OAR and the Receiver's duties under it, the Receiver's immunity under both the OAR and federal law and the effect, if any, of the *Plata* court's March 30, 2006

[4] This Court determined that removal was also permissible under Section 1442(a)(1) because there was "a causal connection between the charged conduct and the official authority." 644 F.2d at 1313.

order. The relationship between the litigation, the federal court's orders and the Receiver's court-ordered responsibilities is thus direct and substantial. Removal was proper.[5]

B. The Eastern District Properly Concluded That It Lacked Subject Matter Jurisdiction.

MDI did not obtain the permission of the Northern District before commencing the action that was ultimately removed to the Eastern District. That failure to comply with a basic principle of federal receivership law – affirmed more than once by this Court in recent years – stripped the Eastern District of subject matter jurisdiction and compelled dismissal of the action.

1. MDI was required, but failed, to obtain permission of the Northern District before bringing suit against the Receiver in the Eastern District.

Since the U.S. Supreme Court's decision in *Barton v. Barbour*, 104 U.S. 126 (1881), it has been settled that federal "common law bar[s] suits against receivers in courts other than the court charged with the administration of the estate." *Muratore v. Darr*, 375 F.3d 140, 143 (1st Cir. 2004). The corollary to the *Barton* rule is that "before suit can be brought against a court-appointed receiver, leave of court by which [the receiver] was appointed must be

[5] The Receiver was entitled to remove without the permission of CDCR, the other named defendant. *See Ely Valley Mines*, 644 F.2d at 1315 ("Since the federal officer is the only one entitled to remove under § 1442, he alone can remove without other defendants joining in the petition, and the entire case is removed to the federal court.").

obtained." *Crown Vantage*, 421 F.3d at 970-971 n. 4, 974; *accord: In re Castillo*, 297 F.3d 940, 945 (9th Cir. 2002); *Kashani*, 190 B.R. at 884; *Muratore*, 375 F.3d at 143; *Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000); *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993). *See also Porter v. Sabin*, 149 U.S. 473, 479 (1893) (appointing court has discretion to decide "whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere").

The *Barton* rule serves two related, prophylactic purposes: to prevent interference by a non-appointing court with the appointing court's oversight of the receivership estate and to prevent harassment of the receiver in the exercise of his or her official duties. Protecting the integrity of the proceedings before the appointing court is a primary concern underlying the *Barton* rule.

> A suit therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is, and the effect of which may be, to take property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained.
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> If the court below had entertained jurisdiction of this suit, it would have been an attempt on its part to adjust charges and expenses incident to the administration by the court of another jurisdiction of trust property in its possession . . . . It would have been an [sic] usurpation of the powers and duties which belonged exclusively to another court . . . .

104 U.S. at 129, 136. The leave requirement "enables the [appointing] Court to maintain better control over the administration of the estate." *DeLorean Motor Co.*, 991 F.2d at 1240.

The other justification for the *Barton* rule, *i.e.*, to protect receivers from the distractions of litigation, has found its most articulate expression in Judge Posner's decision *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998), which this Court cited with approval in *Crown Vantage*. The receiver:

> is working for the court that appointed or approved him, administering property that has come under the court's control. . . . If the [receiver] is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded . . . Without the requirement [of leave to sue], [receivership] will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as [receivers].

Crown Vantage, 421 F.3d at 974, quoting *Linton*, 136 F.3d at 545.

To give teeth to these policy considerations, the *Barton* rule is *jurisdictional*: "[t]he nonappointing court may not entertain suits against the [receiver] for acts done in the [receiver's] official capacity without leave from the appointing court because the other court lacks subject matter jurisdiction." *Kashani*, 190 B.R. at 884; *accord: Crown Vantage*, 421 F.3d at 974; *Carter*, 220 F.3d at 1253.

MDI does not dispute that the challenged actions of the Receiver were undertaken in the Receiver's official capacity; indeed, MDI has repeatedly attempted to sue the Receiver in his official capacity for those very acts. (2 ER 53, 121.) The OAR gave the Receiver complete authority over contracting with respect to the prison medical care system, as well as over all administrative, managerial and legal matters. (2 ER 104.) The Receiver's decision to terminate MDI's services arose out of the Receiver's concerns over the legality of those services, including possible unlawful corporate practice of medicine and the fact that MDI's "contract" had been awarded without compliance with California laws governing public contracting. (SER 97 *et seq*.)

Decisions regarding the nature of the services to be provided to the prison medical system, who should provide those services and how contracts for those services should be awarded are integral to the Receiver's efforts to bring the system up to constitutional standards. Of equal importance, all of the funds in the hands of the Receiver are *public* funds; the Receivership is being operated exclusively with taxpayer dollars. (2 ER 107.) Since waste of financial resources in the prison medical care system was a matter of concern to the *Plata* court (*Plata*, 2005 U.S. Dist. LEXIS 43796 at *9), the Receiver has a special obligation to ensure that precious public funds are being spent wisely and not being funneled to contractors providing services that are of questionable

lawfulness at best and downright illegal at worst. Even more so than in most cases involving claims of misfeasance by a receiver or trustee, here "institutional concerns . . . are weighty." *In re Lehal Realty Assoc*., 101 F.3d 272, 277 (2d Cir. 1996).

As Judge Shubb stated in granting the Receiver's motion to dismiss:

> Significant interests of public policy support the conclusion that Judge Henderson should have be[en] apprised of the instant matter and be given the initial option to hear the allegations. Specifically, the importance of this matter cannot be separated from its critical backdrop. Unlike typical receiverships . . . this is a receivership over a public entity involving matters of constitutional significance. In his original Plata decision, Judge Henderson identified "an unconscionable degree of suffering and death sure to continue if the system is not dramatically overhauled." In an effort to catalyze reform and rehabilitate this "institutional paralysis," Judge Henderson charged the receivership with the express duties that the instant matter now challenges. Judge Henderson would thus be in the best position to evaluate the Receiver's conduct.

Medical Devel. Int'l. v. CDCR, 2008 WL 436930, *4 (E.D. Cal., Feb. 14, 2008) (citations omitted).

MDI's claims also directly implicate the interpretation and application of the OAR, the March 30, 2006 order, the Receiver's duties and obligations under those orders and the Receiver's immunity. Despite the centrality of the Northern District's orders to the case, however, MDI failed to provide Judge Henderson with even the opportunity to determine whether the case should proceed before him.

Had the Eastern District permitted MDI's case to proceed without the *Plata* court's approval, it would have amounted to a "usurpation of the powers and duties which belonged to another court." *Barton*, 104 U.S. at 136. The Eastern District was demonstrably correct, therefore, in dismissing MDI's complaint.

2. The limited exception to the *Barton* rule found in 28 U.S.C. § 959(a) is inapplicable to MDI's claims.

MDI argues that the *Barton* rule survives only in vestigial form, as if it is some relic from the distant past, and that 28 U.S.C. § 959(a) provides the rule of decision on this appeal. Quite the opposite is true.

To begin with, this Court has specifically rejected the argument that *Barton* "has been superseded" by Section 959(a). *Crown Vantage*, 421 F.3d at 971. Instead, *Barton* is the rule and Section 959(a) is the exception, an exception used so sparingly over the years that one is at pains to find a case cited in MDI's brief which actually applied the statute. As discussed below, the cases hold that Section 959(a) applies only to suits against receivers in routine litigation arising out of the day-to-day operations of the entity in receivership, not to suits that challenge the receiver's own actions in fulfilling court-ordered duties and obligations.

Section 959(a) provides in part that leave of the appointing court is not required when receivers are sued "with respect to any of their acts or transactions in carrying on the business connected with [receivership] property." Just four years ago, this Court, like the other courts of appeal that have considered the issue, held that possession, administration, collection and preservation of estate property – all of which might appear at first blush to come within the statute – do *not* constitute "acts or transactions in carrying on the business" of the estate. *Crown Vantage*, 421 F.3d at 971-972. *See also Muratore*, 375 F.3d at 144, 145-146; *Carter*, 220 F.3d at 1254; *Linton*, 136 F.3d at 546; *Lehal Realty Assoc.*, 101 F.3d at 276.

Accordingly, alleged wrongs committed by the receiver during the administration of the estate do not fall within the statutory exception to the *Barton* rule. *Kashani*, 190 B.R. at 884 (breach of fiduciary duty in administration of estate property does not constitute an "act or transaction" in carrying on business of estate); *see also Muratore*, 375 F.3d at 146-147 (same); *Carter*, 220 F.3d at 1253 (same); *Harris v. Witman*, 2007 U.S. Dist. LEXIS 62184, *20-*27 (S.D. Cal., Aug. 21, 2007) (breach of contract claim not "act or transaction" in carrying on business of estate).

The cases "reason[] that proceedings against a [receiver] for alleged breach of duty in connection with the administration of the estate should be

heard in the [appointing] court. . . ." *Lehal Realty Assoc.*, 101 F.3d at 275. Because the appointing court oversees the receiver and the receivership, it is that court which is in the best position to determine, in the context of the overall administration of the estate, how and whether claims challenging the receiver's actions should proceed. *Medical Devel. Int'l v. CDCR*, 2008 WL 436930 at *4.

Section 959(a), therefore, applies only to a narrow range of cases. This Court has stressed that the "few examples of suits that have been allowed under § 959(a) include a wrongful death action filed against an operating railroad trustee and suits for wrongful use of another's property." *Crown Vantage*, 421 F.3d at 972. *See also In re Beck Industries*, 725 F.2d 880, 887 (2d Cir. 1984) (Section 959(a) was "enacted to deal with garden variety cases" like those dealing with persons injured by operation of railroad).

MDI discusses almost none of the very few cases that have applied the statute. Nevertheless, a review of those cases reveals that they all involve routine operational conduct and none involved alleged wrongdoing by receivers or trustees themselves in the course of their official duties. *See Gableman v. Peoria, Decatur & Evansville Railway Co.*, 179 U.S. 335 (1900)(suit for personal injuries caused by operation of crossing by railroad in receivership not removable under the existing law); *McNulta v. Lochridge*, 141 U.S. 327 (1891)(wrongful death action against railroad in receivership as a result of

negligence in operation of railroad crossing); *Haberern v. Lehigh & New England Ry. Co.*, 554 F.2d 581, 585 (3d Cir. 1977)(suit by employee to recover disability and pension benefits promised to him by the railroad and its officers during period of trusteeship); *Valdes v. Feliciano*, 267 F.2d 91, 94-95 (1st Cir. 1959) (suit for personal injuries caused by train at crossing owned by railroad subsequently operated by trustee in bankruptcy); *Carpenters Local No. 2746 v. Turney Woods Products, Inc.*, 289 F. Supp. 143 (W.D. Ark. 1968) (in dicta, court states that no permission required for action against trustee seeking specific performance of pre-bankruptcy collective bargaining agreement; case dismissed on other grounds). If any rule can be gleaned from the relative handful of cases applying Section 959, it is this: permission of the appointing court is not required where the receiver has been sued in his/her capacity as an employer or for torts committed by agents of the business in receivership in the course of day-to-day operations.

This case is hardly routine or garden variety. The Receiver was not "operating" the prison medical care system in his dealings with MDI. To the contrary, he was exercising his court-ordered authority over medical contracting and legal and administrative functions in the prison medical care system. The Receiver, and the Receiver alone, possessed decision making authority over

medical contracting – that function was specifically conferred upon him by the OAR. (2 ER 102, 104.)

MDI's suit alleged that the Receiver's abused that authority in connection with the decision to terminate MDI's services by making misrepresentations, engaging in "economic duress" and abusing legal process, among other misdeeds. (2 ER 144 *et seq*.) Similar claims of wrongdoing by receivers and trustees in the course of their official duties have consistently been held to be outside the reach of Section 959(a). *See, e.g., Muratore*, 357 F.3d 140 (abuse of process and other torts outside the statute); *DeLorean Motor, Co.*, 991 F.2d 1236 (malicious prosecution claim outside statute); *Taraska v. Carmel*, 223 B.R. 200 (D. Ariz. 1998)(defamation claim).

One need only consider the implications of MDI's claims proceeding without Judge Henderson's authorization to see why permission was required. During a period of severe budget constraints in California, MDI seeks millions of dollars in compensatory and punitive damages from the Receiver – public funds that otherwise would and could be put to use in connection with the Receiver's duties. The Receiver would be required to expend time, energy and resources defending the claim, even as he is trying to carry out his court-authorized duties in an increasingly difficult political and economic climate. The distraction and diversion of resources would inevitably and adversely

impact the Receiver's ability to meet the herculean challenges set for him by the *Plata* court. *Barton*, 104 U.S. at 129, 136. It is frankly inconceivable that this action could be prosecuted without any review by or input from the Northern District. But that is precisely what MDI argues should occur in this case. There is, however, no authority for so sweeping an interpretation of Section 959(a). The statute offers no safe harbor to MDI.

3. Whether *Barton* or Section 959(a) applies is determined by the conduct alleged, not by the capacity in which the receiver has been sued.

At the core of MDI's argument is a false dichotomy between a receiver's personal liability and his official liability. MDI incorrectly contends that the leave requirement applies only to the former. *See* AOB, pp. 27-28.

The case law demonstrates that it is the conduct underlying the claim, rather than whether the receiver or the receivership estate will bear ultimate liability, which determines the applicability of either *Barton* or its exception in Section 959(a). *Barton* itself was an action for personal injuries in which the receiver had been sued *only* in his official capacity. 104 U.S. at 126. Because the order appointing the receiver in that case had immunized him personally from damages in the operation of the railroad in receivership, only the assets of the receivership estate were at stake. *Id*. at 127, 136. Similarly, the Second Circuit has specifically held that a claim against a bankruptcy trustee only in his

official capacity was subject to the leave requirement. *In re Beck Industries*, 725 F.2d at 886-887.

Other cases are in accord. In *Muratore*, 375 F.3d 140, the defendant was sued "in his capacity as trustee," but the court held that *Barton* applied. The trustees in *Carter*, 220 F.3d 1249 and *DeLorean Motor Co.*, 991 F.2d 1236, respectively, had each been sued individually *and* in their capacity as trustee. The courts' respective analyses applying *Barton* and rejecting application of Section 959(a) were dependent on the conduct alleged and not upon the capacity in which the trustees had been sued. *See also Van Horn v. Hornbeak*, 2009 U.S. Dist. LEXIS 5701 (E.D. Cal., Jan. 28, 2009) (dismissing claims against the Receiver individually and in official capacity for plaintiff's failure to comply with *Barton* rule).

DeLorean Motor Co. is particularly instructive. In that case, the trustee had been sued individually and in his official capacity. The claims against the trustee were dismissed, but the plaintiff attempted to sue the trustee's lawyers, "in their capacity as counsel for [the] trustee." 991 F.2d at 1241. The court nevertheless enforced the leave requirement because the "protection that the leave requirement affords the Trustee *and the estate* would be meaningless if it could be avoided simply by suing the Trustee's attorneys. . . . [S]uch a suit is

essentially a suit against the trustee." *Id*. (emphasis added). A threat to the estate alone was sufficient to trigger the leave requirement under *Barton*.

The policies of protecting the appointing court from interference and protecting the receiver and the estate from harassing litigation are at least as strong when the receiver has been sued in his official capacity as when he has been sued personally. In either event the suit threatens disruption of the orderly administration and conduct of the receivership. For example, in *Taraska v. Carmel*, 223 B.R. 200, plaintiff contended – in an argument that is the exact reverse of MDI's here – that leave to sue was not required because the trustee had been sued personally for "ultra vires" acts, rather than in his official capacity, and so there was no potential for harm to the estate. Citing Judge Posner's opinion in *Linton*, the court disagreed:

> Under the Seventh Circuit's reasoning, the added burden to trustees of having to defend against suits brought against them in a nonbankruptcy forum is sufficient justification for applying the rule that such suits must be approved by the appropriate bankruptcy court. The Seventh Circuit's concern about the distracting nature of such suits *does not depend on whether the plaintiff is seeking to impose liability against the assets of the debtor's estate or the assets of the trustee*.

Id. at 203 (emphasis added).

If the capacity in which a receiver is sued determined the applicability of the *Barton* rule, then whether leave to sue is required would be in the hands of the plaintiff, not the appointing court. All that a plaintiff need do to avoid the

leave requirement would be to add the words "in his official capacity" in the caption following the receiver's name. The salutary purposes underlying the leave requirement would be subordinated to the plaintiff's strategic determination as to whether the chances of recovery were better from the receiver personally or from the receivership estate. This would effectively gut the *Barton* rule. Not surprisingly, there is no support for MDI's argument in the cases. This Court should reject it.

4. MDI's remaining arguments are without merit.

a. The *Barton* rule is not applicable only to bankruptcy trustees.

MDI suggests that the *Barton* rule applies only to bankruptcy trustees and, more specifically, to liquidating trustees. AOB, pp. 33-35. There is no authority for this proposition. *Barton* itself involved a receiver, the cases which extended the rule to bankruptcy trustees acknowledge that the doctrine originated with receivers (*e.g., Crown Vantage*, 421 F.3d at 970-971), and *Barton's* principles have been acknowledged or applied by this Court in cases involving federal equity receivers. *See SEC v. Weneke*, 622 F.2d 1363, 1369 n. 9 (9th Cir. 1980); *SEC v. United Financial Group, Inc.*, 576 F.2d 217, 220 & n. 7 (9th Cir. 1978); *SEC v. Lincoln Thrift Ass'n*, 557 F.2d at 1277 n. 1; *Cf. New Alaska Devel. Corp. v. Guetschow*, 869 F.2d 1298, 1304 (9th Cir. 1989)

(challenge to receiver's fees and allegations that receiver was negligent in management of business should have been pursued in appointing court).

b. Application of the *Barton* rule is not dependent upon "exclusive" jurisdiction in the appointing court.

MDI's final contention is that the Eastern District erred because the *Barton* rule purportedly requires that the appointing court have "exclusive jurisdiction over the property or entity under receivership." AOB, p. 35 (emphasis in original). Because a California appellate court has concluded that state courts retain their state constitutional jurisdiction over inmate petitions for writs of habeas corpus challenging medical care (*In re Estevez*, 165 Cal.App.4th 1445 (2008)), MDI argues there is no "exclusive jurisdiction" in the *Plata* court, and therefore, the "Eastern District should never have applied the *Barton* Rule." AOB, p. 35. The train of MDI's logic has derailed once again.

To begin with, the *Barton* rule itself presupposes that courts other than the appointing court may exercise jurisdiction over claims against a receiver; *Barton* merely requires that the appointing court's permission to bring such a claim be first obtained. 104 U.S. at 136.

Nor is *Estevez* inconsistent with *Barton*. Under state law, the respondent in a habeas corpus petition is the warden where the prisoner is confined. Cal. Penal Code § 1474. Because the OAR confers exclusive authority over medical

decisions and personnel on the Receiver, the Attorney General contended that the warden could not implement any remedy ordered in a habeas case and therefore was not a proper respondent. 165 Cal.App. 4th at 1451. The *Estevez* court recognized that if it agreed with the Attorney General, and concluded that state courts had no jurisdiction over the Receiver, "the practical effect would be the suspension of our habeas corpus power, contrary to the express provisions of article I, section 11, of the California Constitution." *Id*. at 1461 n. 7. And, if state courts were divested of jurisdiction over habeas corpus petitions, dramatic collateral effects would surely ensue. Not only would Judge Henderson likely be swamped with hundreds, and potentially thousands, of such petitions from California inmates, even the additional step of requesting permission to sue would slow the process of obtaining relief in such cases, many of which involve claims of immediate need.

Aside from these prudential concerns – which MDI does not and could not argue apply here – medical habeas cases can be brought without Judge Henderson's permission because they are analogous to the ordinary negligence cases arising out of business operations which historically have been permitted under Section 959(a). Medical habeas cases allege failure to provide appropriate care to the petitioner by medical staff at the prison. *See* 165 Cal. App. 4th at 1451. The petitioners do *not* challenge the *Receiver's* acts or

omissions or the authority conferred on the Receiver by the OAR. The Receiver is only a nominal respondent; he is not alleged to have committed any wrongdoing in either his personal or official capacity. Since delivery of proper care to an individual inmate is consistent with the goal of improving care generally, medical habeas cases do not typically interfere with the *Plata* court's oversight of the Receivership.

By contrast, MDI here seeks to hold the Receiver liable for millions of dollars in damages based upon the Receiver's conduct in connection with authority specifically conferred upon him by the OAR. As one court recently said in applying the *Barton* rule, and distinguishing *Estevez,* with respect to claims against the Receiver:

> Here, plaintiff does not seek habeas corpus relief. Rather, she seeks monetary damages from the Receivers for performance of their official duties as appointed by Judge Henderson. Plaintiff also seeks monetary damages against the Receivers in their individual capacities for engaging in the exact same conduct as in their official capacities. Thus, *Estevez* is not persuasive.

Van Horn v. Hornbeak, 2009 U.S. Dist. LEXIS 5701 at *16-*17. Similarly, this case – unlike state habeas cases – falls squarely within the *Barton* rule and required Judge Henderson's permission before it could be brought. The Eastern District properly applied the *Barton* rule and properly concluded that this case

was not governed by Section 959(a). The judgment of dismissal should be affirmed.[6]

II. THE NORTHERN DISTRICT PROPERLY EXERCISED ITS DISCRETION TO DENY MDI PERMISSION TO SUE THE RECEIVER.

Whether to grant or deny permission to sue a receiver in another court is committed to the sound discretion of the appointing court. *Crown Vantage*, 421 F.3d at 976; *Kashani*, 190 B.R. at 881; *Lincoln Thrift Ass'n*, 557 F.2d at 1277. The analysis has two steps. First, the court must determine if the proposed action states a prima facie case against the receiver. *Kashani*, 190 B.R.at 885. If the moving party fails to state a prima facie case, permission to sue will be denied. *Id.*

Second, even if the moving party has established a prima facie case, the appointing court must undertake "a balancing of the interests of the parties

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[6] The *Plata* court retains ultimate authority to control even litigation properly brought under Section 959(a). The statute provides in full as follows:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. *Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice*, but this shall not deprive a litigant of his right to trial by jury. (Emphasis added.)

Thus, Section 959(a) authorizes the appointing court "in a proper case to enjoin the continuation of a suit in another court – even a suit within the purview of the first sentence of § 959(a)." *Diners Club v. Bumb*, 421 F.2d 396, 401 (9th Cir. 1970).

involved" to determine whether the "suit should more properly be maintained in the [appointing] court." *Id.* at 886. *See also Crown Vantage*, 421 F.3d at 976.

Applying this analytical framework, the Northern District concluded that MDI failed to state a prima facie case because the Receiver is immune from the claims asserted by MDI. This decision was demonstrably correct and the Court should affirm. If this Court concludes, however, that reversal is warranted, then the case must be remanded to the District Court so that it can determine if MDI otherwise states a prima facie case and, if so, to undertake the necessary balancing of interests to determine whether it will retain jurisdiction or allow the case to proceed in some other court.

A. The Receiver Enjoys Quasi-Immunity From Suit.

Paragraph II.F of the OAR provides that "[t]he Receiver and his staff shall have the status of officers and agents of this Court, and as such shall be vested with the same immunities as vest with this Court." (2 ER 106.) Because the Receiver is carrying out duties prescribed by the court, he "derives his immunity from the judge who appointed him." *Mullis v. United States Bankruptcy Ct.*, 828 F.2d 1385, 1390 (9th Cir. 1987); *New Alaska Devel. Corp.*, 869 F.2d at 1302-1303. An appreciation of the scope of the Receiver's immunity conferred by the OAR requires, therefore, a discussion of the immunity available to judges.

1. Judges are absolutely immune from suit for all claims arising from actions in their judicial capacity.

"Judges are absolutely immune from civil liability for damages for their judicial acts." *Mullis*, 828 F.2d at 1394. "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-357 (1978).

Absolute judicial immunity is "an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991). Accordingly, the immunity applies to "*all* claims relating to the exercise of judicial functions." *Burns v. Reed*, 500 U.S. 478, 499 (1991) (Scalia, J., concurring and dissenting; emphasis added). It follows, therefore, that judges are immune from claims asserted against them in their official, as well as their individual, capacity. *See, e.g., Sadoski v. Mosley*, 435 F.3d 1076 (9th Cir. 2006) (judge sued in both his official and individual capacities; in finding that judge had immunity, this Court drew no distinction between such capacities); *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (judge sued only in official capacity entitled to immunity); *Marcello v. State of Maine*, 468 F. Supp. 2d 221, 225 (D. Me. 2007)(immunity extends to judge sued in both individual and

official capacity); *Middleton v. Farley*, 2006 U.S. Dist. LEXIS 44185, *13 (D.N.J., June 26, 2006)(same); *Edwards v. Wilkinson*, 233 F. Supp. 2d 34, 37 (D.D.C. 2002)(same).

2. The Receiver is entitled to quasi-judicial immunity because his actions were taken in his official capacity on behalf of the court.

Absolute quasi-judicial immunity is extended to nonjudicial officers, such as receivers and bankruptcy trustees, "if they perform duties functionally comparable to those of judges, i.e., duties that involve the exercise of discretion in resolving disputes." *In re Castillo*, 297 F.3d 940, 948 (9th Cir. 2002), citing *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993). The "relevant inquiry" for whether immunity applies in a particular instance "is the 'nature' and 'function' of the act, not the 'act itself.'" *Mireles*, 502 U.S. at 13. The "key question" is "whether judges themselves, when performing the function at issue, would be entitled to absolute immunity." *Castillo*, 297 F.2d at 949.

Receivers enjoyed immunity at common law because they were representatives of the court and needed to be able to perform their functions free from harassing litigation. *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 2 (1st Cir. 1976), citing *Davis v. Gray*, 83 U.S. 203, 218 (1872). As the Court in *Barton* stated, "[i]f the receiver is to be suable as a private proprietor of the railroad would be, or as the company itself whilst

carrying on the business of the railroad was, it would become impossible for the court to discharge its duty to preserve the property and distribute its proceeds among those entitled to it according to their equities and priorities." 104 U.S. at 136. Thus, a "common practice" had developed whereby "a court of equity in its decree appointing a receiver of a railroad property, [would] provide that he shall not be liable to suit unless leave is obtained of the court by which he is appointed." *Id*.

Barton teaches that the receiver's immunity from suit in his personal and official capacities *and* the appointing court's jurisdiction to decide whether suit against the receiver could proceed were effectively two sides of the same coin. They each served the purpose of protecting the integrity of the court's oversight and administration of the receivership estate.

These same policy considerations have led the federal courts in this Circuit and elsewhere to confer immunity from suit on receivers and trustees for acts taken in their official capacity on behalf of the court. *New Alaska Devel. Corp.*, 869 F.2d at 1303; *Mullis*, 828 F.2d at 1394. *See also Crown Vantage*, 421 F.3d at 976 (noting that trustee "acting within the scope of his or her authority under the . . . orders of the court" entitled to immunity); *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995); *Property Mgt. & Invest., Inc. v. Lewis*, 752 F.2d 599, 602-603 (11th Cir. 1985); *T & W Invest. Co. v. Kurtz*, 588

F.2d 801, 802 (10th Cir. 1978); *Kermit Constr. Corp.*, 547 F.2d at 2; *Friedlander v. Cook*, 2007 U.S. Dist. LEXIS 97764, *5-*6 (D.N.M., Sept. 30, 2007); *Murray v. Gilmore*, 231 F. Supp. 2d 82, 88-89 (D.D.C. 2002); *Walker Mgt., Inc. v. Affordable Communities of Missouri*, 912 F. Supp. 455, 457 (E.D. Mo. 1996).

Receivers could scarcely function if they had to worry that every action or decision on behalf of the court could lead to litigation. Accordingly, just as absolute immunity for judges is designed to protect the judicial process from the burdens of litigation (*Burns*, 500 U.S. at 494), receivers are entitled to immunity lest they become "'a lightning rod for harassing litigation aimed at judicial orders.'" *New Alaska Devel. Corp.*, 869 F.2d at 1303 quoting *Kermit Constr. Corp.*, 547 F.2d at 3. Quasi-judicial immunity applies, therefore, to acts or omissions of the receiver "intimately connected with [his] receivership duties." *New Alaska Devel. Corp.*, 869 F.2d at 1304.

Indeed, the underlying rationale for immunizing receivers is that they are engaged in functions that the court itself would otherwise have to undertake. As this Court emphasized in *New Alaska Devel. Corp.*:

> The cases reason that the receiver functions as an arm of the court by making decisions about the operation of a business that the judge otherwise would have to make. A receiver operates the business only because the court has directed him to do so in connection with a case pending before the court.

869 F.2d at 1303 n. 6. *See also Drew v. Baktash*, 2001 U.S. Dist. LEXIS 25857, *17-*19 (D.D.C., Sept. 18, 2001) (receiver for public agency is immune as "extension" of the court).

The history of the *Plata* litigation illustrates the point. Prior to the appointment of the Receiver, the *Plata* court issued a series of orders in the remedial phase of the litigation that were intended to bring prison medical care up to constitutional standards. *Plata v. Schwarzenegger*, 2005 U.S. Dist. LEXIS 43796 at *4-*6 (describing remedial orders). By virtue of these and other orders, the Northern District was directly involved in the implementation of the remedial program. *E.g.*, *id.* at *100-*101. It was the failure of that pre-Receiver remedial scheme that provided the impetus for the Receiver's appointment. *Id*. at *52-*56.

Absent the Receiver, the District Court would have been forced to continue direct involvement in the ongoing administration of the prison medical system. Therefore, the District Court delegated to the Receiver, as the court's representative, the authority to take control of the system and to fashion a comprehensive remedial plan designed to bring the system into constitutional compliance. The OAR vests in the Receiver very broad authority to administer the prison medical care system, including exclusive authority with respect to

negotiating and re-negotiating contracts, as well as authority over all legal and administrative functions connected with the delivery of medical care in the prisons. It was just these functions that the Receiver was exercising when he investigated, then terminated, MDI's services.

As an officer of the federal court, the Receiver could neither accept nor simply acquiesce in unlawful conduct in connection with the provision of MDI's services. The Receiver was acting within his discretionary authority over contracting, therefore, in questioning the lawfulness of MDI's services; in requiring satisfactory proof that those services were lawful before agreeing that payment to MDI could be made; and, in terminating those services after MDI not only failed and refused to prove it was conducting business lawfully, but began eliminating services to inmate-patients. (SER 97-101.) The Receiver's exercise of such discretion was clearly within the "ambit of [his] official duties." *Mullis*, 828 F.2d at 1390.

Surely if the District Court had decided, in the absence of the Receiver, that payment to MDI should be halted and then that MDI's services should be terminated, Judge Henderson would have been entitled to immunity for any claims arising from those decisions, even if those decisions were erroneous. *Stump*, 435 U.S. at 356-357. Since the Receiver was exercising "discretionary

judgment" in carrying out the duties conferred upon him by the Northern District, he too is entitled to immunity. *Castillo*, 297 F.3d at 949.

B. Quasi-Judicial Immunity Applies To Claims Against The Receiver In His "Official Capacity."

As with its arguments pertaining to the *Barton* rule, MDI contends that immunity applies only to the Receiver in his personal capacity, and not to suits against the Receiver in his official capacity. This is a convenient reversal of field from MDI's contention before the Eastern District that Sillen could not be personally immune from the claims asserted (SER 141), and no doubt has everything to do with the fact that Kelso replaced Sillen as Receiver. Be that as it may, just as MDI was wrong about the scope of the *Barton* rule, it is wrong about the scope of the Receiver's immunity.

1. The OAR and the law require application of the immunity to the Receiver in his official capacity.

As indicated above, judges are entitled to immunity in both their official and individual capacities. *See* cases cited at pp. 40-41. Because the OAR confers on the Receiver the "same immunities" as those vested in the District Court, it follows that the Receiver is cloaked with immunity in his official capacity as well. This alone is dispositive of MDI's claims.

Moreover, MDI has not really addressed the authorities that Judge Henderson relied upon in concluding that the immunity applied to the Receiver in his official capacity. (*See* 1 ER 10 n. 3.) Those authorities and others acknowledge that quasi-judicial immunity can extend to subordinate judicial officers sued in their official capacity.

For example, in *Mullis*, 828 F.2d 1385, in addition to the judges, a court clerk and a bankruptcy trustee had been named as defendants. Like the judges, the other defendants had been sued for prospective relief directed at "ordering the dismissal of the bankruptcy case and prohibiting enforcement of any orders or judgments entered during the proceedings." *Id*. at 1391. Thus, the prospective relief targeted actions that could only have been carried out by the defendants in their official capacity. This Court applied the immunity to all defendants.

Similarly, in *Duvall v. County of Kitsap*, 260 F.3d 1124, the judge and the other defendants, including a court administrator, had all been sued *in their official capacities only*. *Id*. at 1133 n. 5. While this Court held that the judge was entitled to absolute immunity in that capacity, questions of fact remained as to whether the administrator was entitled to immunity.

> [T]he type of decision-making authority Botta [the administrator] exercised in Duvall's case appears, at the very least, to raise an issue of

> material fact as to whether she was acting in an administrative rather than quasi-judicial capacity.

Id. at 1134-1135. The *Duvall* Court did not hold that immunity for the court administrator in her official capacity was unavailable as a matter of law – as MDI contends. Instead, a trial was necessary to determine whether the immunity applied to her in her official capacity.

And, in *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916 (9th Cir. 2004), the defendants, members of a state medical board which engaged in certain adjudicatory functions, were sued in their individual and official capacities. In discussing the applicability of judicial and quasi-judicial immunity, this Court did not draw any distinction between the capacities in which they had been sued. *Cf. Murray v. Gilmore*, 231 F. Supp. 2d at 88 n. 2, 90 (noting that receiver might be immune in official capacity but that receiver had waived the defense).

The Second Circuit's decision in *Bradford Audio Corp. v. Pious*, 392 F.2d 67 (2d Cir. 1968), is illustrative. In that case, the trial court ordered the receiver to seize a bank account owned by the debtor for the benefit of creditors. The debtor sued the receiver seeking return of the funds, as well as for damages. The court held that the receiver was immune. *Id*. at 72-73. Although the court did not expressly discuss the capacity in which the receiver

had been sued, the immunity necessarily applied to him in his official capacity. This is so because the bank account, which plaintiff sought to recover, was an asset of the estate seized and held by the receiver only in his official capacity for the benefit of creditors. *See also Drew v. Baktash*, 2001 U.S. Dist. LEXIS 25857 at *17-18* (court applied immunity to receiver for public social services agency, to "employees of the Receivership" *and* to the "Receivership") and at *19 (receiver was "an entity that was an extension of this Court").

Since the Receiver and the Receivership here were "extensions" of the District Court, any suit against the Receiver in his "official capacity" for conduct in the course of his official duties is, in effect, a suit against the court that appointed him. Because the court itself is immune, the Receiver should be immune in his official capacity no less so than in his personal capacity.

2. The policies underlying the immunity require application of the immunity to the Receiver in his official capacity.

It would defeat the very purpose of the immunity – which is to free the judicial officer from the threat of harassing and costly litigation – if a receiver had to defend claims against the receivership estate arising out of the *receiver's own actions* for which the receiver had personal immunity. Such a suit could just as easily be a "lightning rod" for harassing litigation (*New Alaska Devel. Corp.*, 869 F.2d at 1303) as a suit against the receiver personally.

MDI has argued that third-party claims against a receiver have traditionally been treated as claims against the receivership estate, rather than as claims against the receiver personally. *See, e.g., McNulta v. Lochridge*, 141 U.S. 327. While this is no doubt true, there are at least two reasons why this general rule – which originated in the context of receiverships over commercial enterprises – should not apply here. As the Supreme Court has stated, "'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 500 U.S. at 493.

First, it cannot be ignored that the Receivership covers a large segment of a public agency and that the Receivership is being operated with public funds. If MDI's crabbed view of the immunity were the rule here, such "immunity" would merely shift liability from the Receiver personally to the prison medical care system or perhaps the State more generally – in either event it would be the taxpayers who would bear the burden of MDI's gambit. The Receiver's "immunity" would amount only to a right to indemnification from the public fisc. But the OAR already provides that the State will indemnify the Receiver *and* that he is entitled to immunity. (2 ER 106.) MDI would collapse the two, eliminating immunity in favor of indemnity. The immunity would no longer be an immunity from *suit*, it would merely be an immunity from personal liability in damages, contrary to the scope of absolute judicial immunity from which a

receiver's immunity derives. *Mireles*, 502 U.S. at 11(judicial immunity is immunity from suit, not just from liability in damages).

Second, application of the traditional rule here would have the ironic effect of imposing liability in damages on the public entity where no such liability would exist under state law. Since MDI had no contract with the Receiver or the Receivership, MDI's rests its claims on Sillen's "abuse" of his position while carrying out his official duties. Under state law, the Secretary of the CDCR would be statutorily immune from liability for the conduct alleged here and, as a result, *CDCR itself would immune*. Cal. Gov't Code § 820.2 (immunity for discretionary acts); Cal. Gov't Code § 815.2 (public agency immune if employee immune); *see Caldwell v. Montoya*, 10 Cal.4th 972, 979 (1995). It would be anomalous indeed if the Receiver, who has supplanted the Secretary of the CDCR and whose discretionary authority is frankly more expansive than the Secretary's, was nevertheless subject to narrower immunity.[7]

In the end, even if erroneous, the Receiver's actions here were "'an integral part'" of the District Court's oversight of the California prison medical

[7]In its complaint in the Northern District, MDI tucked in some contract and quasi-contract claims against the Receiver in his "official capacity" that had not been in its complaint in the Eastern District, presumably to avoid just the argument made above. But MDI is being too clever by half. As the Receiver argued before the District Court (SER 113 *et seq*.), there is no dispute that MDI had no contract with the Receiver or the Receivership, and quasi-contract recoveries are prohibited where, as here, the formalities of public contract law have not been followed. *See Miller v. McKinnon*, 20 Cal. 2d 83, 87-88 (1942).

care system. *New Alaska Devel. Corp.*, 869 F.2d at 1303. The Receivership, as well as the Receiver himself, should be immunized from harassing litigation arising out of the Receiver's discretionary decisions made in the course of bringing the prison medical care system up to constitutional standards.

3. The Receiver does not contend that he is immune from all claims in all circumstances.

The horrible that MDI trots out in support of its arguments is that the Receiver is arguing that he can breach contracts and commit torts at will and never be liable. Nonsense.

The Receiver has never contended, and does not contend, that if he or an agent of the Receivership breaches a lawful contract with the Receivership, the Receivership has no liability. Nor has the Receiver ever contended that claimants who are injured in the day-to-day operation of the prison medical care system are without a remedy because of the Receiver's immunity from suit. *See, e.g., In re Estevez*, 165 Cal. App. 4th 1445. The Receiver is regularly participating in such cases and is not asserting immunity. *Id*. at 1455. And the Receiver does not contend that the immunity applies to wrongdoing that is wholly outside the scope of his authority. *New Alaska Devel. Co.*, 869 F.2d at 1304-1305.

MDI's problem, which it hopes this Court will forget, is that it had no lawful contract with the Receivership. It tried to negotiate an agreement with CDCR without the Receiver's knowledge or consent, undertook to provide services without the Receiver's knowledge, consent or authorization and refused to cooperate with the Receiver in his investigation into those services, all the while attempting to skirt the requirements of California law. Not surprisingly, the Receiver ordered MDI out of the prisons. Now MDI wants the *Receiver* to compensate it. This case exemplifies why receivers are and should be immune from *all* harassing litigation that arises from their exercise of discretionary judgment.[8]

4. The cases cited by MDI are inapposite.

The cases that MDI relies upon in support of its argument that the Receiver is not entitled to immunity in his official capacity are inapposite. For example, *In re Jacksen*, 105 B.R. 542 (9th Cir. BAP 1989), involved a pre-petition claim against the individuals in bankruptcy. Not surprisingly, the bankruptcy court concluded that the claim could not be enforced against the trustee personally but, if enforced, could only be enforced against the assets of the estate. *McNulta v. Lochridge*, 141 U.S. 327, involved a plaintiff injured by

[8] Whether *CDCR* should be required to respond in damages because its officials facilitated MDI's incursion into the state prisons is a separate question for the state courts, not this Court, to answer.

the operation of a railroad in receivership and did not involve wrongs allegedly committed by the receiver himself.

And *In re Rollins*, 175 B.R. 69 (E.D. Cal. 1994), addressed whether the trustee had liability to the estate for breaching his fiduciary responsibilities to pursue and protect the assets for the benefit of the creditors. The court held that, absent a court order approving the trustee's conduct, he could not claim immunity in those circumstances. *Id*. at 77. MDI quotes a dictum from that case that a "contract or tort claimant is generally permitted to pursue the estate and trustee in his or her representative capacity, but not personally." *Id*. at 77 n. 7. This statement is accurate as far as it goes, but only as far as it goes. As indicated above, the Receiver agrees that legitimate obligations incurred by or on behalf of the Receivership may be enforced against the Receivership. The Receiver's position here is merely that he is entitled to immunity in whatever capacity he has been sued for alleged wrongs he has committed while exercising discretionary judgment within the scope of his official duties on behalf of the District Court. The cases cited by MDI are not to the contrary.[9]

The District Court properly concluded that the Receiver was entitled to immunity in his official capacity to the same extent as he was entitled to

[9] MDI argues that the District Court also relied upon *In re Rigden*, 795 F.2d 727 (9th Cir. 1986), and then undertakes to try and distinguish the case. AOB, p. 44. The District Court neither cited nor relied upon *Rigden*. Furthermore, the case does not discuss a receiver's immunity.

immunity in his personal capacity and to the same extent as the court itself. As such, the District Court properly denied MDI leave to sue.

C. If This Court Does Not Affirm, It Must Remand To The District Court To Permit It To Decide Whether To Retain Jurisdiction Over MDI's Suit.

If, despite the foregoing, the Court concludes that the Receiver in his official capacity is not immune, this case should be remanded to the District Court to permit it to determine whether it, or some other court, should adjudicate MDI's claims. *Kashani*, 190 B.R. at 886-887. This Court has identified a number of factors that courts must consider in determining whether to retain jurisdiction over claims against receivers and trustees. *See Crown Vantage*, 421 F.3d at 976, citing *Kashani*, 190 B.R. at 886-887 (listing five factors to be considered). "The existence of 'one or more of [such] factors may be a basis for the [appointing] court to retain jurisdiction over the claims.'" *Crown Vantage*, 421 F.3d at 976.

In addition to asserting that he was immune from suit, the Receiver argued below that MDI's proposed complaint failed to state claims upon which relief could be granted on various state law grounds. (*See* SER 113 *et seq.*) Because the District Court rested its decision on the Receiver's immunity it did not reach those other arguments. Thus, the lower court did not consider whether MDI failed to make out a prima facie case based on the Receiver's

other arguments or undertake the balancing called for by *Crown Vantage* and *Kashani*. The District Court must be permitted to make those determinations in the first instance. *Kashani*, 190 B.R. at 887.

III. THIS COURT SHOULD DECLINE MDI'S REQUEST FOR AN ADVISORY OPINION AS TO WHETHER CDCR MAY RELY ON THE RECEIVER'S IMMUNITY FROM SUIT

MDI did not request the Northern District's permission to sue CDCR in state court. Nor could it have made such a request, since there was no requirement for it to do so. (1 ER 1.) However, because CDCR – as distinct from the prison medical care system in Receivership – has previously advanced the novel argument that it is entitled to take advantage of the Receiver's immunity, MDI asked Judge Henderson to render an advisory opinion on that issue. Judge Henderson wisely declined to do so. (1 ER 1-4.) It would likewise be error for this Court to reach out and rule on the question presented by MDI. Such a ruling would constitute an "unconstitutional advisory opinion." *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007).

CONCLUSION

For all the foregoing reasons, this Court should affirm the judgment of the Eastern District and the order of the Northern District. If the Court reverses

the order of the Northern District, the Court should remand to that court to permit it to complete the analysis required by *Crown Vantage* and *Kashani.*

Dated: February 23, 2009

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CERTIFICATE OF COMPLIANCE

Case No. 08-15759

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7) (B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 13,128 words.

February 23, 2009

/s/ Martin H. Dodd
Martin H. Dodd

STATEMENT OF RELATED CASES

Appellee is aware of the following cases deemed related pursuant to Ninth Circuit Rule 28-2.6:

Docket No.	**Name**
08-17362	*Plata v. Schwarzenegger*
08-17412	*Plata v. Schwarzenegger*
08-74778	*Schwarzenegger v. USDC-CAN*

Appellee is the appellee in Case No. 08-17412 and the real party in interest in Case No. 08-74778. Although those cases, like this case, arise out of the *Plata* litigation in the District Court, they do not involve any of the legal issues pending before the Court in this matter. Oral argument in those two cases was held before Judges Schroeder, Canby and Hawkins on February 12, 2009. Appellee is not a party to the appeal in the other matter, but believes it arises out of a three-judge panel proceeding commenced pursuant to 28 U.S.C. § 3626.

Dated: February 23, 2009

FUTTERMAN & DUPREE LLP

By: /s/ Martin H. Dodd
Martin H. Dodd
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DECLARATION OF SERVICE

I hereby certify that on February 23, 2009, I electronically filed the foregoing with the Clerk for the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

February 23, 2009

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Lori Dotson